

Coronet Foods, Inc. and General Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 697 a/w International Brotherhood of Teamsters, AFL-CIO

Russell L. Haught. Cases 6-CA-21051, 6-CA-21251, 6-CA-21737, and 6-CA-21091

March 10, 1995

**SUPPLEMENTAL DECISION AND ORDER
REMANDING**

BY MEMBERS STEPHENS, COHEN, AND
TRUESDALE

September 30, 1991, the National Labor Relations Board issued a Decision and Order¹ finding, among other things, that the Respondent, Coronet Foods, Inc., violated Section 8(a)(1), (3), and (5) of the Act. The Board ordered the Respondent to reestablish its transportation department as it existed prior to April 29, 1989, and to offer reinstatement to 25 employees it unlawfully laid off or terminated. On January 5, 1993, the United States Court of Appeals for the District of Columbia enforced the Board's Order.² A controversy having arisen over the amount of backpay due under the Board's Decision and Order and over the requirement that the Respondent restore its transportation department,³ the Regional Director for Region 6 issued a backpay specification and notice of hearing alleging the amount of backpay due the claimants and notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations.⁴

Respondent filed an answer to the backpay specification on March 15, 1994.⁵ The answer generally denied the General Counsel's formulas for computing backpay, and the application of those formulas to the individual discriminatees. The Respondent additionally raised several affirmative defenses, including the argument that restoration of its transportation department would be unduly burdensome.

¹ 305 NLRB 79.

² 981 F.2d 1284.

³ In its Decision and Order, the Board ordered the Respondent to reestablish the transportation department, which it closed on April 29, 1989. The Board rejected, for lack of evidence, the Respondent's argument that it would be unduly burdensome to restore its transportation department. Both the Board and Court of Appeals noted, however, that the Respondent could submit at the compliance stage evidence concerning the appropriateness of the restoration remedy, provided that evidence was unavailable at the time of the unfair labor practice hearing. *Lear Siegler, Inc.*, 295 NLRB 857 (1989). 305 NLRB 79 fn. 6 (1991), *enfd.* 981 F.2d 1284, 1288 (D.C. Cir. 1993).

⁴ The specification provided that if the Respondent's answer failed to deny any allegations in the specification, and the failure to do so was not adequately explained, these allegations would be deemed true and the Respondent would be precluded from introducing any evidence controverting them.

⁵ All dates are in 1994 unless noted.

On March 21, the General Counsel filed with the Board a motion to strike the Respondent's answer, or alternatively, for summary judgment. The General Counsel argued in his motion that the Respondent's answer was procedurally defective under Section 102.56(a) of the Board's Rules and Regulations, and substantively deficient under Section 102.56(b) because most of the Respondent's general denials related to matters within the Respondent's knowledge. The General Counsel further argued that the Respondent's affirmative defenses were unsupported, and that it improperly sought to relitigate the restoration issue by relying on events predating the unfair labor practice hearing. The General Counsel urged the Board to strike the Respondent's answer in its entirety or, alternatively, to grant summary judgment as to all specification allegations except those relating to interim earnings and employee expenses.

On March 22, the Respondent filed with the Board a motion to amend its answer, and an amended answer. The Respondent sought in its amended answer to cure the alleged procedural defects in its original answer. And, although the Respondent asserted that its original answer satisfied the substantive requirements of Section 102.56(b), it provided additional information relating to the General Counsel's proposed backpay formula, application of that formula, and affirmative defenses.

On March 24, the General Counsel filed with the Board a brief opposing the Respondent's motion to amend. On March 28, the Respondent filed a response to the General Counsel's opposition brief.

On March 24, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On April 11, the General Counsel filed a memorandum in support of its motion to strike or for summary judgment. On the same date, the Respondent filed a response to the Notice to Show Cause, as well as a second amended answer.

In its second amended answer, the Respondent denies allegations in the backpay specification that the discriminatees' pretermination hours of work and wages are appropriate for determining the employees' gross backpay. Instead, the Respondent contends that the formula should be based on the hours and wages of subcontractors' employees who performed the discriminatees' work. *Woodline Motor Freight*, 305 NLRB 6 (1991), *enfd.* 972 F.2d 222 (8th Cir. 1992). The Respondent also argues, among other things, that the discriminatees' jobs have changed, that it would be unduly burdensome to require it to reinstate its trucking operation, and that the formula used for determining gross backpay should not be based on hours worked or miles driven that exceed legal limits.

On April 19, the General Counsel filed a memorandum opposing the Respondent's response to the Notice to Show Cause and to strike the Respondent's second amended answer.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion to Strike or, Alternatively, for
Partial Summary Judgment

I. OVERVIEW

Section 102.56(a), (b), and (c) of the Board's Rules and Regulations specify, in relevant part, that:

(a) Filing and service of answer; form.—Each respondent alleged in the specification to have compliance obligations shall, within 21 days from the service of the specification, file an original and four copies of an answer thereto with the Regional Director issuing the specification, and shall immediately serve a copy thereof on the other parties. The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the mailing address of the respondent.

(b) Contents of answer to specification.—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.—If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation shall

be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

II. PROCEDURAL DEFECTS

The General Counsel alleged in his March 21 motion to strike that the Respondent's answer was deficient under Section 102.56(a) because: (1) it was not sent directly to the Regional Director; (2) it was not signed or sworn to by the Respondent or its agent; (3) no power of attorney was affixed; and (4) it did not include the Respondent's mailing address. The General Counsel additionally asserted in his memorandum supporting this motion, filed April 11, that the Respondent failed to file the requisite number of copies of its answer as prescribed by Section 102.56(a).

We agree with the General Counsel that the Respondent's March 15 answer was procedurally defective, as alleged. See, e.g., *Scotch & Sirloin Restaurant*, 287 NLRB 1318 (1988); *Standard Materials, Inc.*, 252 NLRB 679 (1980). Further, the Board usually strikes pleadings that substantially fail to comply with the Board's procedural rules. *Contractors Excavating, Inc.*, 270 NLRB 1189, 1190 (1984). Here, however, in response to the General Counsel's motion to strike, the Respondent promptly filed an amended answer with the Acting Regional Director for Region 6 curing the procedural deficiencies in its original answer.⁶

The General Counsel asserts that the Respondent's amended answer should be rejected. The General Counsel argues that because the backpay specification was not amended, the Respondent could not amend its answer. We disagree. The Board consistently has interpreted Section 102.121 to provide that the Board's Rules are to be liberally construed, and has held that nothing in the Rules precludes the filing of an amended answer, even in the absence of an amended specification. *Standard Materials*, supra, at 680. Further, in comparable circumstances, the Board has freely permitted attempts to cure procedural defects, either through amended answers prior to the backpay hearing, or through responses to a Notice to Show Cause, which responses the Board treats as amended answers. See, generally, *Vibra-Screw, Inc.*, 308 NLRB 151, 152 (1992); *Mash Transportation*, 289 NLRB 49 (1988).

Accordingly, because the Respondent cured the procedural deficiencies in its original answer in its March 22 amended answer, we deny the General Counsel's motion to strike the Respondent's answer on this

⁶It is unclear whether the amended answer contained a designation of representative and accompanying verification. However, it is clear that these documents, which were dated March 21, were received by the Region by at least April 8.

basis.⁷ See, e.g., *Baumgardner Co.*, 298 NLRB 26, 27 (1990), *enfd.* 140 LRRM 2928 (3d Cir. 1992).

III. SUBSTANTIVE DEFECTS

In paragraphs 1 through 14 of the backpay specification, the General Counsel sets forth his formula for calculating the discriminatees' backpay, including, among other things, the representative period for determining backpay rates, subsequent rate adjustments, hours for which backpay is owed, and supplemental earnings to which dockmen/loader-drivers were entitled. Paragraphs 21 through 45 of the specification apply this backpay formula to each of the 25 discriminatees, and includes expenses incurred by the discriminatees and their interim earnings. Paragraph 46 summarizes the backpay calculations.

The General Counsel contended in his motion to strike and for summary judgment, that the Respondent's March 15 answer to the specification was substantively deficient in several respects. Specifically, the General Counsel alleged that the Respondent's general denials to specification paragraphs 1 through 14, 46, and 21 through 45—except as the latter relate to the discriminatees' expenses and interim earnings, were deficient under Section 102.56(b) because these allegations concern information within the Respondent's knowledge. The General Counsel further asserted that the Respondent's affirmative defenses should be stricken because they seek to relitigate the restoration issue, or they fail to set forth alternative formulas with appropriate supporting figures.

Although the Respondent disputed the General Counsel's claim that its answer was substantively deficient, it filed amended answers on March 22 and April 11. The Respondent claims that its answer, as twice amended, contains the specificity necessary to satisfy Section 102.56. The General Counsel argues that the Respondent should not be permitted to amend its answer, and that, in any event, the March 22 and April 11 answers do not satisfy Section 102.56(b).

We agree with the General Counsel that the Respondent's initial answer was substantively deficient in several respects. *Shenandoah Coal Co.*, 312 NLRB 30 (1993). However, contrary to the General Counsel's arguments as to the amended answers, we accept the Respondent's amended answers.⁸ Having accepted the amended answers, we find that the Respondent's sec-

ond amended answer is substantively sufficient except as follows.

First, the General Counsel contends that the appropriate backpay formula should be based on the discriminatees' wage rates during a representative period prior to their unlawful layoffs or discharge. The Respondent argues in paragraphs 1(c) and 3(c) of its second amended answer that "no former employee is entitled to an award of backpay that is greater than that paid to employees who performed similar duties for subcontractors hired by the Respondent." To the extent that the Respondent argues in these paragraphs that the wage rate in the backpay formula cannot exceed that rate paid to subcontractor employees who performed the discriminatees' work during the backpay period, this argument is stricken. Thus, any lesser wage rates paid subcontractor employees are not an appropriate standard for determining backpay owed the discriminatees. *Hansen Bros. Enterprises*, 313 NLRB 599, 603 (1993).⁹

We also strike paragraph 1(d) and affirmative defense 5 of the Respondent's second amended answer insofar as the Respondent argues that backpay cannot be based on hours worked or miles driven that violate state or Federal law. The Respondent cannot now rely on its own unlawful conduct as a basis for limiting the discriminatees' backpay. Further, we are not requiring the Respondent to violate the law; rather, we are ordering it to make whole its 25 employees for that which they would have earned but for the Respondent's discrimination.¹⁰

We additionally strike paragraphs 12 and 13 of the Respondent's second amended answer to the extent the Respondent asserts that dockmen/loader-drivers are not entitled to supplemental earnings after April 30, 1989, when they ceased performing driving duties. Thus, the Board and the court found that the Respondent unlawfully terminated its transportation department on April 29, 1989. The Respondent cannot rely on this unlawful act as a basis for contending that it consequently changed the duties of its dockmen/loaders.¹¹

⁹ However, except as otherwise noted in this decision, the Respondent is permitted to litigate in the compliance hearing its claim that the discriminatees' backpay should be based on hours worked or miles driven by subcontractors' employees. We leave to the judge to determine whether the Respondent has provided sufficient supporting figures for this alternative formula.

¹⁰ The Respondent is permitted to litigate in the compliance proceeding, its argument that state or Federal laws require that the discriminatees be reinstated to different terms and conditions of employment. *Electronic Data Systems Corp.*, 305 NLRB 219, 221 fn. 9 (1991), *enfd.* in relevant part 142 LRRM 2825, 2830 (5th Cir. 1993), but remanded to the Board to determine whether respondent would have consolidated its operation even absent antiunion animus.

¹¹ For the same reason, we strike par. 39(b) of the second amended answer insofar as it alleges that discriminatee Randall Reed is not entitled to backpay after April 30, 1989.

⁷ In accepting the Respondent's amended answer, we reject its argument that the amendment should additionally be permitted because the General Counsel failed to provide it with an opportunity to amend the original, deficient answer before filing a motion to strike. It is well settled that such an opportunity is not required. *Aquatech, Inc.*, 306 NLRB 975 fn. 6 (1991).

⁸ See generally *Toledo 5 Auto/Truck Plaza*, 306 NLRB 842, 843 (1992).

Finally, the Respondent contends in paragraph 1(b) and various other sections of its second amended answer¹² that its backpay obligation should be tolled on August 24, 1989. The Respondent contends that as of this date, when it presented evidence in a 10(j) injunctive proceeding in the United States District Court for the Northern District of West Virginia, it became unduly burdensome for it to reinstate its transportation department. Although the Respondent may raise its “undue burden” defense in the compliance hearing,¹³

¹²Specifically, the Respondent raises this argument in pars. 1(b), 2, 3(b), 4, 7 through 10, 13 through 17, subpar. (b) and (e) of 21 through 45, and in its first and third affirmative defenses in the April 11 answer.

¹³Although we agree with the General Counsel that the Respondent’s initial answer sought to relitigate the restoration issue which the Board and court resolved in the underlying unfair labor practice proceeding, the Respondent appended financial records and other documents to its response to the Notice to Show Cause which it argues are the types of evidence that it would introduce in the compliance hearing on the restoration issue. As these exhibits, which the Respondent provided the Region during the investigation of the backpay issue, all relate to facts postdating the unfair labor practice hearing, we deny the General Counsel’s Motion for Summary Judgment insofar as it would preclude the Respondent from challenging

it cannot introduce, or rely upon, any evidence available at the time of the July 1989 unfair labor practice hearing. *Lear Siegler*, supra; *Direct Transit*, 309 NLRB 629 fn. 4 (1992).

ORDER

IT IS ORDERED that the General Counsel’s motion to strike and for summary judgment is denied, except as noted above.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 6 for the purposes of noticing and scheduling a hearing before an administrative law judge.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on the record evidence. Following service of the administrative law judge’s decision on the parties, the provisions of Section 102.46 of the Board’s Rules shall apply.

the continued propriety of the Board and court’s restoration remedy, as prescribed in *Lear Siegler*.